

1 IN THE DISTRICT OF THE UNITED STATES OF AMERICA

2 FOR THE SOUTHERN DISTRICT OF ILLINOIS

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DANE HARREL, et al.,
7 Plaintiffs,

v.

Case No. 23-cv-141-SPM

8

KWAME RAOUL, et al.,
9 Defendants.

10 FEDERAL FIREARMS LICENSEES OF
ILLINOIS, et al.,

11 Plaintiffs,

v.

Case No. 23-cv-215-SPM

12

JAY ROBERT "J.B." PRITZKER, et al.,
Defendants.

14 CALEB BARNETT, et al.,
15 Plaintiffs,

v.

Case No. 23-cv-209-SPM

16 KWAME RAOUL, et al.,
17 Defendants.

18 JEREMY W. LANGLEY, et al.,
19 Plaintiffs,

v.

Case No. 23-cv-192-SPM

20

BRENDAN KELLY, et al.,
21 Defendants.

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23 Transcript of Oral Argument - Volume II
April 12, 2023

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5 Transcript of Oral Argument - Volume II
6 April 12, 2023
7 Proceedings held in person before
8 the Honorable **STEPHEN P. McGLYNN**,
9 United States District Judge Presiding
10 East St. Louis, Illinois
11

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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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TRANSCRIPT OF PROCEEDINGS

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(Proceedings commenced at 4:00 p.m.)

3

MR. WELLS: I want to -- if I may --

4

THE COURT: I did use up a lot of time. How much of
5 your slide show --

6

MR. WELLS: At this point, I want to address history,
7 the historical prong, and I think I can make it fairly quick.

8

THE COURT: We'll give you a little bit of leeway.

9

MR. WELLS: And frankly, I spoke with Ms. Murphy --

10

THE COURT: No. I'm going to give you more time. I
11 want to get this right. Oral argument is very important.
12 It's very helpful. You have watched this a lot of times and
13 when I was in the appellate court I learned the importance of
14 oral argument. I saw how often it changed people's minds and
15 I'm not under any arbitrary guidelines. I want to make sure
16 that everybody is able to make the arguments they feel they
17 need to make to advance their positions. I'll give you a
18 five-minute warning when your time is running, but I'm going
19 to give you some time because there's still a lot to go
20 through.

21

MR. WELLS: I think there is, Your Honor, but I think
22 I want to address the history prong. I think it has been
23 acknowledged by both sides, really. There is some type of
24 interplay between common use for self-defense under the text
25 prong and the historical tradition of regulating dangerous and

1 unusual weapons, how weapons in particular come to be
2 regulated.

3 Plaintiffs suggest that there's some type of
4 numerical threshold that gets passed where all of a sudden the
5 weapon is then beyond the scope of regulation. And again, it
6 goes back to their syllogism of arms that are common, are not
7 unusual and therefore, there's not historical tradition.
8 Frankly, that's not how history happened, and I think we
9 introduced expert declarations that lay out that, in fact,
10 it's, one, weapons are invented and then they proliferate and
11 the proliferation of particular weapons and their use in
12 particular types of violence which is what causes legislatures
13 to regulate them. It's not that these weapons are somehow
14 uncommon. It's, in fact, that they're proliferating and
15 causing problems. So that's dangerous and unusual weapons
16 tradition. That is the tradition that I don't think
17 plaintiffs dispute that it exists and we know that from
18 Justice Kavanaugh in his concurrence. And he's quoting,
19 again, *Heller*. He's just quoting *Heller*. There is an
20 acknowledgment that there is this tradition. The question
21 before this Court is whether or not the act is consistent with
22 that tradition.

23 How do we make that determination? *Bruen* tells us
24 that we use analogical reasoning. Analogical reasoning we
25 also know that it's not a regulatory straight jacket and it's

1 also not a blank check. The State has to identify a well
2 established and representative historical analog, but not a
3 historical twin. And when one of two circumstances is
4 present, unprecedented societal concerns or dramatic
5 technological change, then the approach to analogical
6 reasoning has to be more nuanced.

7 We would suggest, Your Honor, that this case involves
8 both dramatic technological change and unprecedented societal
9 concern. I think this is evident from the nature and
10 attributes of the weapons that are at issue.

11 Plaintiffs, I think at one point, questioned whether
12 or not we took the position that only weapons in 1791 are
13 those that are protected by the Second Amendment. We've never
14 said that. That was not our position. Our position has been
15 to look at history and look at the evolution of weapons
16 technology for a couple of reasons. One, to assess whether
17 there has been this dramatic technological change; and two, to
18 assess what types of regulatory responses have been prompted
19 by the dramatic technological change in prior eras, right?
20 Once the Supreme Court says you can consider dramatic
21 technological change, you have to consider when the technology
22 arose and what impacts it had and how did legislatures
23 respond. So it necessarily requires consideration beyond
24 1791, beyond 1868.

25 Again, this case, I think, if you compare colonel era

1 muskets to AR-15s, it is obvious that there's been a
2 substantial evolution of firearms technology since then. I
3 think we would also suggest that there's been a substantial
4 evolution in firearms technology really between 1868 and the
5 mid 20th century, significantly forward. And that's why when
6 you look at in particular machine gun regulations, 1920s and
7 1930s, the regulations become more stringent. There's no
8 doubt. Conceal carry regulations of Bowie knives, of other
9 types of revolvers, that's what they were. They were largely
10 conceal carry regulations. But when the attributes of the
11 weapon become more dangerous, more powerful, higher rate of
12 fire, the nature of the regulation changes. That's dramatic
13 technological change. Throughout history, that is how
14 regulatory means have adapted to the particular technology.
15 And again, we know from *Heller* that machine guns in particular
16 are something that *Heller* presumed could be regulated. Why?
17 Because of the particular technology involved and the
18 particular attributes that made them high rate of fire
19 battlefield weapons.

20 We think a similar set of considerations brings AR-15s and
21 other assault weapons within the scope of that tradition. So
22 this is a case that involves dramatic technological change.

23 Unprecedented societal concern. Your Honor, we
24 discussed this at the beginning. I think Your Honor
25 acknowledged the reality of mass shootings. I think Your

1 Honor acknowledged while there may have been instances of
2 large scale violence in our country in the past, usually
3 perpetrated in groups, what we are looking at is something
4 new; a single individual that can carry a weapon into a school
5 and kill large numbers of in a short period of time. That is
6 an unprecedented societal concern.

7 THE COURT: Let me ask you this question: Could a
8 fair reading of history in the United States with respect to
9 guns say that the law abiding citizenry, it's okay for them to
10 be equipped with firearms that would give them a fair chance
11 to defend themselves against the weapons that they might be
12 facing? So would a -- if you had a Remington 22 Rimfire in
13 1776, a lever rifle that had 22 rounds, the Civil War would
14 have lasted about six weeks. So as the technology has
15 increased so has the fire power and the weaponry of people who
16 seek to do you harm. And isn't it a fair reading of the
17 Second Amendment in the history that you should be able to
18 defend yourself against likely threats?

19 The thing about the machine guns, very few people had
20 them at the time and so the weapons that were being used by
21 the average citizens, they were tremendously outgunned. I'll
22 let you comment on that observation.

23 MR. WELLS: Your Honor, so I think the machine gun
24 reference is important because if the premise is that you have
25 to have equivalency between people who are going to use

1 weapons in a criminal manner and the public at large, then I
2 think machine gun laws are out, right? Thompson machine guns
3 were being used to kill people, to commit criminal acts. Did
4 that mean then that citizens also had to have equivalent
5 weaponry? Legislatures concluded that the answer to that
6 question was no.

7 THE COURT: And maybe they concluded law abiding
8 citizens don't have equivalent weapons. Nobody has these
9 things except the people who are using them for crime. That's
10 why we're getting rid of them.

11 MR. WELLS: So, Your Honor, again, I would go back to
12 the way *Heller* looked at specific types of weapons. We know
13 it was three that we looked at that were unprotected. One
14 that was protected. Handgun, you look at the attributes and
15 the use. You see that it has particular attributes for
16 self-defense. It is being used for self-defense. On the
17 other side of the equation, three other types of weapons;
18 short barrelled shotgun may have certain attributes that make
19 it good for self-defense. It is not as heavy. It can be
20 aimed more easily by a slight person, but how is it being
21 used? It is being used by people to commit crimes in a manner
22 that can be regulated. Is there some tension? Undoubtedly.

23 THE COURT: There's always going to be some tension.

24 MR. WELLS: I think the question is what does the
25 Constitution require? And what latitude does the legislature

1 have to make that judgment? About handguns, we know. *Heller*
2 says quintessential self-defense weapon. Weapons that are
3 being used to perpetrate mass shootings, who decides, Your
4 Honor?

5 THE COURT: Well, look, you take the AR-15s off the
6 market, under this statute a bolt-action rifle is legal. We
7 all see what happened in Dallas in '62 with a guy who had a
8 \$19 bolt-action rifle and a scope. Oswald, I think it was an
9 Italian rifle, a Carcano weapon, I'm trying to think, but it
10 has a six round simple magazine. He is shooting at a moving
11 target 100 yards and more away, and it's not full body. It's
12 just upper body.

13 He gets off three shots. Depending on who you ask,
14 he got off three shots in a little less than eight seconds or
15 11 seconds. One shot hits a traffic light, the other one is
16 the kill shot and we've all seen it because we've all seen
17 that video. The other one did lethal damage. The guy in
18 Texas perched up there with a bolt-action rifle and a lot of
19 ammunition, killed a lot of people. If Oswald had just
20 decided, well, up here on the 6th floor of the school book
21 depository, I'm just going to keep firing until they take me
22 out, every minute if every third shot was a kill shot, every
23 second shot was a serious wound and every third shot was a
24 miss, in a minute and a half he's killed eight people with a
25 gun that is perfectly legal under this law, and I'll let you

1 address that question.

2 MR. WELLS: Your Honor, there's no doubt that gun
3 violence is a significant problem and has been for extended
4 stretches of our history. And that particular weapons,
5 rifles, bolt-action rifles, have been used to perpetrate
6 horrendous crimes where multiple people have died. I also
7 know, Your Honor, and I would point to the chart that we've
8 got up on the screen and that is in our brief, that the
9 frequency of high fatality mass shootings and the number of
10 fatalities that are involved, look at the cluster, Your Honor.
11 Look at the cluster. It is -- yes, Texas shooting on here,
12 right? But how often is it happening, Your Honor?

13 THE COURT: Do any of these include mass shootings
14 perpetrated with guns that were legal under this statute?

15 MR. WELLS: Yes. Our position is not -- and again,
16 we're not suggesting that through this act mass shootings will
17 stop. I don't think we've ever made that claim. Will this
18 act reduce the likelihood by limiting access? Hopefully.
19 That is the intent of the law. What we know from empirical
20 research -- and I would point you in particular, Your Honor,
21 to our Professor Klarevas's declaration and research he's done
22 in particular on large capacity magazines.

23 THE COURT: It's very interesting. I read it.

24 MR. WELLS: States that have regulations like those
25 in the act, they don't eliminate mass shootings, but they

1 reduce the lethality of them, and that is the type of
2 objective that I think the legislature can rifely strive for.
3 And Your Honor, I think we've talked about -- some about
4 history, but I do think it's important to address a couple of
5 things that came up from plaintiffs. And again, one is the
6 suggestion that once you pass a numerical threshold certain
7 weapons are off the table. That's not how the historical
8 traditional has happened. If you look at the 1686 New Jersey
9 law that we cite in our brief and that I have got up here on
10 the screen, it says "Whereas, there have been great complaint
11 that several persons wearing swords, daggers, pistols, dirks,
12 stilettos, skeins or any other unusual or unlawful weapons by
13 reason of which several persons in this province receive great
14 abuses and put in great fear and quarrels and challenges made
15 to the great abuse of the habitants of this province."
16 They're telling us the why from *Bruen*. They're telling us in
17 the statute why they're acting. And its not because these
18 weapons are rare. It's because they're prevalent, and they're
19 being used for criminal purposes, and that's why they're being
20 regulated.

21 Similar trajectory with the Bowie knife, Your Honor.
22 Invented in the 1820s, starts to be a preferred weapon in
23 duals and fights. People are carrying them and killing one
24 another. What happens? There's regulatory response.

25 Revolvers patented, 1836 Colt revolver. As we allude

1 to in our brief and some of our declarations, it struggled for
2 a little bit to get adopted, but then it starts to become
3 poplar around the Civil War and immediately thereafter and
4 starts to be used in criminal violence. What happens? It
5 gets regulated.

6 We have got an 1872 Wisconsin statute, Your Honor,
7 that we specifically highlight in our brief, it regulated
8 revolvers. It included them in the list of what were
9 considered dangerous and unusual weapons or in Wisconsin's
10 terminology, offensive and dangerous weapons. So plaintiffs
11 talk about, well, it is dangerous and unusual and you got to
12 do both like its some type of statutory text, it's a historical
13 tradition. I don't think it lends itself to the type of word
14 play that plaintiffs are engaged in. It is a concept that has
15 applied to many different things throughout history and we
16 have to look at it broadly to assess what were legislatures
17 trying to do. How did they do it, and is the act that we're
18 looking at now does it satisfy that how and why test that
19 *Bruen* articulates? So the idea that it somehow just counts or
20 if it's unusual -- it can't be -- if it's common, it can't be
21 unusual. That's not the way history has happened. Weapons
22 have been regulated because they become more common and become
23 used in criminal violence in a way that gets the legislature's
24 attention.

25 THE COURT: I see the one is a misdemeanor, the last

1 one you referenced made possession that was a misdemeanor. In
2 this statutory claim if somebody forgets to register or just
3 not filing, their first violation is a misdemeanor. The
4 second violation is a felony. So you can find lawful gun
5 owners who have committed no crimes, who never threatened
6 anybody, who have a long history of owning firearms and never
7 doing anything wrong facing a class three felony and you and I
8 know what that means. Two to five years. That conviction
9 they're a felon in possession, all their firearms have to be
10 surrendered. They'll never be able to possess any gun or any
11 ammunition ever again unless pardoned by the Governor. That's
12 pretty darn steep.

13 MR. WELLS: Your Honor, what I would say to that is
14 that there is a mens rea requirement that requires knowledge.
15 This isn't a strict liability situation. Knowledge has to be
16 required. So a person who has already gotten a misdemeanor
17 conviction and then yet again? They know their obligations
18 under the law. The other thing I would say, Your Honor, is
19 that we have prosecutors who are imbued with discretion.

20 THE COURT: Some of them don't want to enforce this.

21 MR. WELLS: You're right. Some of them are suing us.

22 THE COURT: Sheriffs don't like it either apparently.

23 MR. WELLS: Sheriffs don't like it. But I can tell
24 you there are members of law enforcement who do like it. Why?
25 Because the AR-15, certain categories with certain calibers,

1 fire a round for which law enforcement's bullet proof vests
2 are not rated. So I understand the sheriff's position.

3 THE COURT: There are people on both sides.

4 MR. WELLS: There are law enforcement members on both
5 sides.

6 THE COURT: Back to my question. You could have a
7 55-year-old man who has passed every background check, no
8 criminal violations whatsoever and because of a failure to
9 register weapons that were perfectly lawful when he bought
10 them he could find himself a convicted felon facing two to
11 five years prison time, but certainly under the law would not
12 be able to possess -- he would have to disgress himself of all
13 -- or forfeit all weapons, legal or not, compliant with the
14 statute or not, that he has.

15 MR. WELLS: Your Honor, I think that same dilemma
16 applies to the short barrelled shotgun. It applies to the
17 machine guns, which because people have possessed them or have
18 acquired them there's certain regulations that apply to them
19 because they are such dangerous items.

20 So the thing I would also point out, Your Honor, is
21 that the focus of this regulation is the industry. How does
22 the statute work? It regulates sale in particular. It talks
23 about manufacturer. It is focused on gun manufacturers and
24 gun dealers. Those are the individuals who are -- the
25 prosecutor's case on mens rea is going to be easier. They're

1 in this industry. They know the futures of the firearms.
2 They know what the regulations are. They know their
3 inventory. That, I think, Your Honor, is where the statute
4 will bite.

5 THE COURT: Five more minutes.

6 MR. WELLS: So Your Honor, again, I think this case
7 comes down in our view to whether or not 20th century machine
8 guns and things like whether or not the AR-15, which has a
9 rate of fire that is quite comparable to machine guns in real
10 practice, that we know are part of this historical tradition,
11 they're part of the dangerous and unusual weapons regulations.
12 Whether or not statutes like Illinois's 1931 law that
13 restricted both the sale, purchase and possession of machine
14 guns, that was part of the historical tradition. That was
15 part of the dangerous and unusual weapons tradition that
16 emerged in the 18th century, that continued in the 19th
17 century and in the 20th century swept in machine guns. Why?
18 Because of how they were being used and because of their
19 particular attributes. It was a well established tradition,
20 Your Honor, sale bans, possession bans. You're familiar.

21 And I would just note, again, that the short barreled
22 shotgun we know from *Heller* that the Miller regulation from
23 1934, it was upheld, even though a barrel was necessary to a
24 firearm and even though the shortness of a barrel is an
25 attribute that might make it better suited for someone to use

1 for self-defense. That is part of the historical dangerous
2 and unusual weapons tradition.

3 So National Firearms Act of 1934, short barrel
4 shotguns. National Firearms Act 1934, machine gun
5 regulations. Federal assault weapons ban in 1994. Was that
6 unconstitutional from the get-go? Again, are there ten years
7 worth of people who are regulated under that who had
8 convictions that are now going to be released? Had the
9 plaintiffs passed the common use threshold in 1994? The only
10 difference between now and then is that since 2004, when the
11 federal assault weapons ban expired, the firearms industry has
12 run a very successful marketing campaign in which they've sold
13 24.6 million AR-15s and similar weapons. Is that how we're
14 going to make a Constitutional determination, that these
15 weapons that were banned under federal law since 2004 they
16 have been sold in great numbers. Your Honor, I would suggest
17 that is not the way we've ever done constitutional law, that
18 the AR-15 regulations, the assault weapons regulations and the
19 large capacity machine regulations in the act, are consistent
20 with the historical tradition.

21 I'm going to talk briefly about irreparable harm,
22 Your Honor. As I mentioned, there are essentially three
23 categories of plaintiffs here; individuals, gun stores,
24 advocacy plaintiffs. The individuals in this case, many of
25 whom have already stated as a matter of record that they own

1 AR-15s, often in multiples, will get to continue to possess
2 those weapons. The gun stores point to lost sales. And yes,
3 we've acknowledged that sales of AR-15s since 2004, they've
4 been pretty good. That is monetary harm, Your Honor. That is
5 not irreparable harm. The organizational plaintiffs, their
6 harm is derivative of the first two groups. What is the other
7 side of the equation, Your Honor? We know that ease of access
8 to AR-15s and large capacity magazines is associated with a
9 significant increase in high fatality mass shootings.
10 Reducing access to them is associated with a reduction in
11 fatalities associated with this particular type of heinous,
12 heinous crime.

13 THE COURT: I know that. I'll give you one more
14 minute to wrap up.

15 MR. WELLS: Understood, Your Honor. So Your Honor,
16 as I mentioned at the outset, you asked who to cite. The
17 elected representatives of the State of Illinois have enacted
18 this statute to address acute social harm and the reason that
19 they've done so is consistent with why legislatures throughout
20 our history have regulated particular weapon types, the means
21 that they have chosen is consistent with how things like
22 machine guns have been regulated, and we think that for those
23 reasons this statute is constitutional and should be upheld.
24 Thank you, Your Honor.

25 THE COURT: Thank you.

1 MS. MURPHY: I just want to make a few points, Your
2 Honor. First, I'd like to start out -- there was a lot of
3 effort to just say repeatedly, oh, this is about sellers, this
4 is about sales. That's not what this is about. Sure, we have
5 plaintiffs in this case who sell firearms and want to be able
6 to sell them. Everybody here is also representing individuals
7 who want to exercise their Second Amendment rights and the
8 people who sell firearms want to be able to sell them to
9 people who want to purchase them. They're individuals on both
10 sides of the equation here and individuals are the people who
11 want to keep and bear these firearms for self-defense.

12 The State seems to want to litigate this case as if
13 *Bruen* never happened. There was much discussion about *Heller*
14 and *Heller* said things that said lots of things about the test
15 that I thought were pretty clear, but whatever *Heller* said
16 *Bruen* has made things very, very clear at this point. And
17 *Bruen* makes crystal clear that this effort to conflate the
18 textural inquiry and the historical inquiry is just mistaken
19 and I will just read from *Bruen* itself. *Bruen* says that the
20 Second Amendment's, quote, definition of arms is fixed
21 according to it's historical understanding and that definition
22 covers modern instruments that facilitate armed defense.
23 That's the definition of inquiry. That's the textural
24 inquiry. That is the end of it. That is the end of the
25 threshold inquiry.

1 We then turn to the historical tradition inquiry,
2 which is when the burden shifts and it is not our burden.
3 It's not our burden to prove that every single arm that is at
4 issue here is commonly possessed as the State's burden to
5 prove that it satisfies historical tradition, and *Bruen* tells
6 us that too, and again, makes clear when it's talking about
7 definitions versus when it is talking about tradition. The
8 Court specifically talks about how the, quote, historical
9 tradition is prohibiting the carrying of dangerous and unusual
10 arms versus arms that are in common use at the time. We know
11 what the test is and the test is not our burden. It's the
12 State's burden. Their burden is one that focuses in on common
13 use. We also know from both *Bruen* and *Heller* that common use
14 is not simply a question of how often do you actually fire the
15 firearm at an assailant in an act of self-defense.

16 *Heller* treated common use as a simple question of
17 possession, and understandably so because the Second Amendment
18 right is the right to keep and bear arms to be armed and ready
19 in the event that you have to face a self-defense situation.
20 It is not simply the bare right to be able to fire the arm in
21 the event someone comes in and tries to attack you or your
22 family. And if that were the test, we would end up with
23 virtually nothing protected since fortunately most people
24 don't have to use their arms in self-defense frequently or
25 ever and about 80 percent of the time that arms are used

1 people successfully ward off assailants by the mere act of
2 brandishing. So if this were really a test that asked you how
3 many rounds do you fire from a particular arm, I am not sure
4 what the State wouldn't be able to ban. I think that's
5 precisely why the Supreme Court has never focused on use in
6 that sense, but has instead treated use as a simple question
7 of are these arms that people keep and bear for the lawful
8 purpose of being armed and ready in the event they need to use
9 them for self-defense.

10 Now, while the State didn't really make any effort
11 here to demonstrate that these are not arms that satisfy that
12 task, we did. It seems we can't win because we put forward
13 evidence and they say your evidence doesn't count because you
14 guys are part of the industry and then they turn around and
15 complain that we, as part of the industry, aren't giving them
16 enough evidence. If the State doesn't like our evidence, the
17 State can do its own surveys. It can conduct its own
18 research and try and make its case that what it wants to
19 prohibit is not something that is in common use for lawful
20 purposes, but Illinois hasn't tried to do that. The
21 legislature didn't try to do that and the State hasn't tried
22 to do that in this litigation, and we do have evidence here
23 that is not just even from -- I certainly take issue with the
24 notion there's something wrong with evidence that comes from
25 NSSF, but we also have evidence in the form of the study done

1 by Professor English that is focusing not just on sales but
2 talking to people about what do you possess. And that is what
3 showed that the numbers actually seem to be higher than the
4 industry had thought in terms of who owns what. And the
5 numbers also show throughout all these studies that this is
6 not something that has just happened in the past few years out
7 of some clever marketing ploy. 20 percent of people who own
8 AR-15 styled rifles have owned them since before 1999, which
9 means really since before the 1994 ban since it wasn't lawful
10 to acquire them during the ban. These are weapons that many
11 people owned even before then.

12 And let's not forget, this is also a case about
13 magazines with a capacity of more than ten rounds for long
14 guns and 15 rounds for handguns and those certainly are not
15 something that have only become popular in recent years
16 through any marketing ploys. They account for roughly half
17 the magazines that are on the market. I do just want to be
18 clear about one colloquy you had with the State. Yes,
19 somebody could carry the 15 round magazine with their handgun,
20 but not any magazine that is higher than 15 rounds with the
21 handgun. Anything above 15 rounds can only be possessed
22 pursuant to the grandfathering provisions in someone's home or
23 carried in a way where it's not accessible when going between
24 places where it is permitted.

25 THE COURT: Are they allowed to carry an additional

1 clip or magazine?

2 MS. MURPHY: 15 rounds.

3 THE COURT: Let's say you have a holster, you have a
4 pistol that has a 15-round magazine. Could they have in their
5 pocket another magazine that they could switch out?

6 MS. MURPHY: They can have another 15-round lower
7 magazine is how I understand it.

8 THE COURT: They could have five more?

9 MS. MURPHY: They could. They could. But to me,
10 that sort of gets at why it's a little hard to completely
11 rationalize the lines the state is drawing in terms of what
12 you can have and what you can't have. It seems that part of
13 the complaint here is that modern firearms are much easier
14 than firearms used to be. Of course, most things
15 technologically today are easier to operate than they were 100
16 or 200 years ago, and it is certainly faster to reload. Now,
17 most people would prefer to not have to reload at all in a
18 self-defense situation, but there is no restriction on how
19 many rounds somebody can --

20 THE COURT: One of the arguments you made was to --
21 the story of the Tommy gun. There weren't many in use, but
22 what led to its outlawing is that they just happened to be
23 used in a number of very public murders and that people said,
24 hey, we've got to do something about this. That's pretty
25 analogous to what has been happening lately with people

1 grabbing AR-15s and deciding I'm going to take out kids at a
2 school or people who are at a parade.

3 MS. MURPHY: With respect, I don't think it is
4 because history with AR-15s or magazines of a certain capacity
5 didn't just start in the past ten years. These are things
6 that have been around for a very long time and they have been
7 commonly possessed without incident by law-abiding citizens
8 for a very long time. And they're possessed in the millions.
9 We're talking about any mass shooting is one too many mass
10 shootings, but fortunately they are a very small number of
11 occurrences. We're talking about a few dozen people that have
12 engaged in these kind of acts as compared to by the State's
13 own estimate six million people who possess these arms.
14 That's just not the kind of comparison that ever existed when
15 it came to something like the Tommy gun. It came on the
16 market in 1925 and was illegal within two years because
17 civilians responded by saying we don't want this. We don't
18 think anyone should have this. We are not thinking about this
19 as something we really need and only a few people are going to
20 misuse. People viewed it as this isn't really something that
21 any of us think is particularly well suited for one on one
22 armed self-defense or even armed small defense guns, multiple
23 assailants. It's just a different kind of technology that
24 people immediately treated as a technology that was unusual in
25 how it operated in that it operated with continuous fire with

1 a single pull of the trigger.

2 So I think the State's effort to conflate
3 semiautomatics and automatics is just belied by history. We
4 have a hundred years of history here and 100 years of history
5 shows that during that whole time the states, the Federal
6 Government, repeatedly treated these technologies as two very
7 different things; as something, one, that never took hold, was
8 never popular. Even today, yeah, there's a few hundred
9 thousand of automatic weapons that are lawfully owned, but
10 they are largely collectors items, not things that people have
11 for purposes like self-defense. They just never took hold.

12 Semi-automatic technology is entirely different. It
13 took hold before automatic technology even made its way onto
14 the market, and it really wasn't until a few decades ago that
15 we started to see any efforts to prohibit it. Even now, this
16 is an outlier law. I mean, 42 states permit the types of
17 firearms that Illinois is trying to prohibit. The Federal
18 Government permits the types of arms that Illinois is trying
19 to prohibit. So even today, we don't have a historical
20 tradition in the sense that I understand *Bruen* to require,
21 which is this is the common thing that the Government can do,
22 not just something that a couple of states have tried to do.
23 It is something that is unusual and it has been subject to
24 significant litigation, and yes, there have been decisions
25 upholding these laws, but oftentimes you have had that over

1 the dissent of judges and you've had members of the Supreme
2 Court raising a lot of concern about it. These are hardly
3 laws that even today have taken hold in society in the way
4 that laws restricting automatic weapons did back when they
5 came into existence almost at the same time as automatic
6 technology itself did.

7 Really, the last point that I would just like to make
8 is the State talked today about the idea that this is all
9 about the notion of self-government and democratic society.
10 But the first rule of democratic society in this country is we
11 have a Constitution that so we can protect some rights that we
12 have decided are so fundamental that they should be protected
13 even when a majority of the people decide to enact legislation
14 that would restrict them. And that's the whole point of the
15 Bill of Rights. Just because a majority of members of the
16 legislature decide that they don't want to hear a particular
17 speech because it's unpopular or they want to allow
18 unreasonable searches because we've had enough with concerns
19 about rising crime rates, that doesn't allow states to become
20 laboratories of experimentation, that states don't get to
21 experiment when we're talking about fundamental constitutional
22 rights. There may be ways that states can regulate,
23 certainly, but the Supreme Court has told us how states may
24 regulate at least when it comes to the Second Amendment and
25 the way they may regulate is by passing laws that they can

1 demonstrate are consistent with this nation's historical
2 tradition of how firearms have been regulated.

3 And what you see all throughout this nation's
4 historical tradition is that when you have advancements in
5 technology that are just about adding features that make
6 firearms easier for somebody to bear, easier for someone to
7 accurately shoot, that allow for somebody who is smaller, who
8 is taller, who is younger, who is older to be able to fire
9 their firearm in a self-defense situation and have the maximum
10 chance of actually successfully utilizing it for self-defense,
11 those are not things that have historically been treated as
12 reasons to say this is something nefarious that we need to
13 keep out of the hands of American people. These are exactly
14 the kinds of advancements that people have welcomed, and they
15 are what have lead firearms to become popular.

16 As we see over time, firearms that became repeaters
17 that can operate more quickly, can fire more rounds, those are
18 welcome developments that understandably people want to see in
19 their firearms and the Supreme Court has now told us very,
20 very emphatically that if the American people choose arms for
21 the -- commonly chose them for the lawful purpose of
22 self-defense then the Government doesn't get to prohibit them.
23 That's what Illinois has tried to do here, not merely regulate
24 but outright prohibit people from obtaining these arms at all.
25 The law just cannot be reconciled with the Second Amendment as

1 interpreted most recently by the Supreme Court in *Bruen*.

2 THE COURT: Thank you. I want to thank the brief
3 writers. There was very well written briefs that were
4 submitted by the parties. There was some amicus briefs that
5 were submitted that were excellent. I certainly appreciated
6 the arguments of counsel. This is very well done. I started
7 off today, in the trial court we see the people, not only the
8 victims but we also see the perpetrators of these things and
9 all of us would love to see a serious reduction in the number
10 of these mass shooter crimes in particular because that's what
11 has been referenced. From where I sit and from what a lot of
12 judges see, I think we have to start looking at not just the
13 guns, but why we have all these troubled teens and young
14 people going through mental health crises. What medicines are
15 they taking? What red flags are we seeing and why are they
16 being allowed to come into school? I think the courts would
17 be happy to see efforts made to identify children, teenagers,
18 individuals who are having a mental health crisis and say you
19 know what, until that person can successfully address that
20 crisis, let's prohibit them from having access to weapons.
21 Nothing like that is in this bill. I hope in the future there
22 are bills that are like that, but that's just me, I guess,
23 editorializing. I've been given a lot to read. You've given
24 me a lot to think about, and we are adjourned.

25 (The hearing was concluded at 4:45 p.m.)

REPORTER'S CERTIFICATE

* * * *

4 I, Erikia T. Schuster, RPR, Official Court Reporter for the
5 U.S. District Court, Southern District of Illinois, do hereby
6 certify that I reported with mechanical stenography the
7 proceedings contained in pages 85-117 and that the same is a
8 full, true, correct and complete transcript from the record of
9 proceedings in the above-entitled matter.

10

11 /S/ Erikia T. Schuster
IL CSR, RPR

4/13/23

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